

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARRY AND JULIE BLOSSICK	:	DETERMINATION
	:	DTA NO. 818866
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax under Article 22 of	:	
the Tax Law for the Years 1994 and 1995.	:	

Petitioners, Harry and Julie Blossick, 245 Cole Avenue, Rochester, New York 14606, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1994 and 1995.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York on June 19, 2002 at 2:45 P.M. Petitioner Harry Blossick appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Shelley N. Socciarelli).

Since neither party elected to reserve time for the submission of post hearing briefs, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether petitioners timely filed returns and paid the tax due as shown on their 1994 and 1995 personal income tax returns and, if not, whether the Division of Taxation properly determined that interest charges should be imposed as the result of petitioners' failure to timely pay the tax due.

FINDINGS OF FACT

1. On some unknown date prior to May 17, 2000, the Division of Taxation (“Division”) corresponded with petitioners advising them that it had no record of either a 1994 or 1995 personal income tax return having been filed under their names or social security numbers. On May 17, 2000, petitioners forwarded to the Division unsigned and undated photocopies of both their 1994 and 1995 New York State resident personal income tax returns. The 1994 return, prepared by one Charles S. Manzella, reported a total tax due of \$2,478.00, less credit for New York State tax withheld from wages of \$2,390.00, leaving a balance due of \$88.00. The 1995 return, prepared by Budget Accounting Service, reflected a tax due of \$1,984.00, less a credit of \$1,927.41 for tax withheld from wages, leaving a balance due of \$56.59. Petitioners maintain that the returns for both 1994 and 1995 were filed in a timely fashion and that the tax due shown on each return was also timely paid in full via a money order.

2. On November 20, 2000, the Division issued a Notice and Demand for Payment of Tax Due to petitioners asserting that \$56.59 of tax, \$23.19 of interest and \$70.59 of penalty was due for the 1995 tax year. A second Notice and Demand for Payment of Tax Due, this one for the 1994 tax year, was issued to petitioners on November 24, 2000 asserting tax due of \$88.00, plus interest of \$46.73 and penalty of \$115.41.

3. Petitioners protested both assessments by filing a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services. A conciliation conference was held on August 14, 2000 and on October 5, 2000 the conferee issued a Conciliation Order wherein the tax and interest charges were sustained and all penalty charges were canceled. Petitioners disagreed with the amounts determined in the Conciliation Order and this proceeding ultimately ensued.

4. Petitioner Harry Blossick is 51 years old with an extensive cardiac history dating back to 1991. He is totally disabled and on oxygen 24 hours a day. Mr. Blossick has been a life long resident of New York State except for a six-year period from 1968 to 1974 when he served in the armed forces. The Division's records reflect that petitioners have filed timely New York State personal income tax returns for the years both prior to and subsequent to the two years in dispute in this proceeding.

5. Mr. Blossick pays his bills by money order "because since I had my heart attacks the bill collectors have been after me like crazy and anybody can get into your bank accounts if they want to." Petitioners did not submit in evidence copies of the respective money orders paying the tax due for 1994 and 1995 and they assert that copies could not be obtained since more than six years elapsed before this matter was brought to their attention.

6. No evidence was adduced by petitioners at the hearing held herein regarding the manner in which the two returns were mailed, i.e., certified, registered, first class, etc. Petitioner Harry Blossick testified that he goes "to an accountant to file my taxes" and that the accountant "drops it in the mail for me with my money orders." No testimony or affidavits from the respective preparers of the two returns were submitted in evidence.

7. The Division has made several searches of its records in an attempt to locate the 1994 and 1995 personal income tax returns which petitioners assert were filed in a timely manner; however, these searches have failed to locate the returns. The Division has also made a search of its unassociated payments records to determine if it has received payments of \$88.00 and \$56.59 which had not been associated with a taxpayer or a particular tax return. This search also proved fruitless.

SUMMARY OF PETITIONERS' POSITION

8. Petitioners assert that they filed timely returns for the years 1994 and 1995 and paid the tax due at the time said returns were filed. Mr. Blossick believes that his income tax returns for both 1994 and 1995 and respective money orders attached to the returns were lost by the Division. Furthermore, Mr. Blossick, as a show of good faith and “to prove I was not lying” has agreed to pay the tax due; however, he strenuously objects to paying interest “for something New York State lost.”

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 651(a) calendar year taxpayers are required to file their personal income tax return by April 15th of the following year. Tax Law § 652(a) provides that a person required to file a return shall “without assessment, notice or demand, pay any tax due thereon to the commissioner on or before the date fixed for filing such return.”

B. In accordance with Tax Law § 691(a) and regulation 20 NYCRR former 146.4(a) and former 146.14(b), returns and payments are considered to have been filed and made on the date of the United States postmark stamped on the envelope. When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Reeves*, Tax Appeals Tribunal, August 22, 1991; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990; *Matter of Filler*, Tax Appeals Tribunal, August 24, 1989; *Matter of WSD United Transp.*, Tax Appeals Tribunal, July 27, 1989).

C. In the instant matter, the Division has established that it has no record of receiving petitioners' returns for 1994 and 1995 prior to the filing on May 17, 2000. Accordingly, the burden is on petitioners to prove (Tax Law § 689[e]), by one means or another, that they filed timely returns for 1994 and 1995 and paid the tax due as shown on said returns. Petitioner Harry

Blossick's testimony concerning the preparation and mailing of the 1994 and 1995 returns, although forthright and sincere, is not sufficient to permit a conclusion that petitioners have met their burden of proving that the returns for both 1994 and 1995 were timely filed and the tax due timely paid (*see, Matter of Miller v. United States*, 784 F2d 728, 86-1 US Tax Cas ¶ 9261; *Matter of Sipam*, Tax Appeals Tribunal, March 10, 1988 [for a general discussion on the filing of various documents with the Division and the Division of Tax Appeals]). Petitioners could have avoided any risk of mishandling of the returns and payments by the Postal Service or by the Division had they used certified or registered mail (Tax Law § 691[a]; 20 NYCRR former 146.4[c]), since certification or registration serves as prima facie evidence that a document or payment was delivered. Petitioners apparently chose to mail their returns using ordinary first class mail, or they failed to retain certified or registered mail records, and therefore they bear the risk of nondelivery or mishandling. By using money orders to pay any tax due and by failing to retain copies of the money orders, petitioners have no records to prove payment. Simply stated, petitioners have placed themselves in a position of being unable to prove that returns were mailed and that the taxes were paid for the years 1994 and 1995.

D. Tax Law § 684, entitled "Interest on underpayment," provides that "[I]f any amount of income tax is not paid on or before the last date prescribed in this article for payment [in this case April 15, 1995 for 1994 and April 15, 1996 for 1995], interest on such amount . . . shall be paid for the period from such last date to the date paid. . . ." By requesting that a portion of the interest charges be abated, petitioners, in essence seek an interest-free loan from the State of New York. As noted by the Tribunal in *Matter of Rizzo* (Tax Appeals Tribunal, May 13, 1993):

Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the

State for its inability to use the funds and to encourage timely remittance of tax due. . . . It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds. . . .

E. While I agree with petitioners that it is entirely possible for the Division to lose tax returns and payments, the odds that it would lose the same taxpayers' tax return for two consecutive years is minuscule. A more plausible scenario, absent any credible evidence of mailing or payment, is that petitioners, feeling the financial burdens caused by Mr. Blossick's illness, did not have the funds available to pay the tax due and therefore did not file the returns. While I am sympathetic to Mr. Blossick's disability and the financial hardships resulting from said disability, there is simply no basis in fact or law which would support a conclusion different from that reached herein.

F. The petition of Harry and Julie Blossick is denied and the two notices and demands for payment of tax due, one dated November 20, 2000 and the second dated November 24, 2000, are, as modified by the Conciliation Order dated October 5, 2001, sustained.

DATED: Troy, New York
August 1, 2002

/s/ James Hoefer
PRESIDING OFFICER